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The Resource Page



NEW BOOKS

ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY*. Carolina Academic Press, 2001 (\$40). 383 pp.

As we go about our daily tasks, all of us tend simply to take care of what needs to be done, without giving much thought to “the big picture.” Those folks who sell day planners and Palm Pilots make money by telling us that we need to focus on our most important goals (the big picture) and then to plan our lives with that big picture in mind, using it to guide us about what to leave in and what to leave out.

Law professor Ellen Sward helps us to locate the big-picture view of the civil jury—and thereby to reorient our discussion of it. Her main thesis is a simple one: that the civil jury performs many functions that merit consideration and protection. She reviews in detail the functions that civil juries perform in our system; she then analyzes how legal changes, especially in the past 50 years, have undermined the ability of juries to perform those functions.

Sward’s review of the functions played by civil juries is scholarly, comprehensive, and insightful. She identifies four overlapping functions or roles: dispute resolution, law-making, a political role, and a socializing role. Her discussion of the jury’s political and socializing roles is intriguing. Sward argues that the jury is the only widespread governmental institution that provides both broad participation by citizens and actual deliberation between them. What’s more, she argues, it is the only governmental institution that *requires* the participation of citizens in deliberation with their fellow citizens.

Whether viewed from the traditional liberal perspective of freedom from governmental interference or from a civic republican perspective encouraging public involvement in government, she contends that this political role of the jury is an important one. For judges, it is important if only to recognize that we are presiding over one of the purest parts of the American democracy every time we convene a jury trial. Sward contends, however, that its importance is much broader than that. She also notes that various judicial settlement efforts may result in a substantial reduction in the number of civil jury trials. To the extent that having such trials promotes our democracy, she suggests that we should factor that value into our calculations when we decide how to manage cases and dockets.

To be sure, Sward recognizes that there are problems inherent in the civil jury. She discusses all of the major criticisms of it (competence and unbridled passion among them). But she concludes that there are important roles for the civil jury to play, both for the sake of our justice system and our democracy, so that we should make sure that enough cases continue to go to the jury to make them meaningful, without, as she puts it, “going to the opposite extreme of coercing unwilling litigants into trial.”

Although the book is 383 pages long, it is a quicker read than that because it is written in law review style with extensive footnotes often taking up more than half of the page. Unless you’re planning on writing your own treatise in the area, you can skip the footnotes and concentrate on the substance of her presentation. In so doing, you’ll find some intriguing insights about the use of civil juries in the United States.

LAURA LANGER, *JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY*. State Univ. of New York Press, 2002 (\$20.95). 158 pp.

Judges like to speak of judicial independence both as a goal and as a reality. Political scientist Laura Langer tries in this book to determine how independent state supreme courts really are.

Her study focuses on decisions from 1970 through 1993 in which the constitutionality of a state statute was decided. Cases reviewing four types of statutes—campaign and election reform, workers compensation, unemployment compensation, and welfare benefits—were included in the study. Langer ran statistical comparisons based on a variety of factors, such as the manner of retention of appellate judges in each state.

Langer attempts to determine whether justices in contested cases voted sincerely, *i.e.*, based on their true preferences, or strategically, *i.e.*, based on possible retaliation by the governor, legislature, or voters. She concluded that strategic voting was involved in the high-profile world of campaign finance, but less so with welfare legislation. She presumes that campaign and election reform legislation is of great salience to the elected officials in the other branches, while welfare reform is less so.

Her book is not easy to read, as it contains lots of statistics and social science jargon, as well as some notions that, at least to a judge, just seem a bit foreign. For example, she says, “Like other politicians, judges are concerned when their electoral or policy goals are threatened.” Not all judges are politicians and most judges we know are appropriately deferential to legislative policy initiatives. Still, the book raises interesting questions and is a valuable contribution to scholarship on state supreme courts.